UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.,
a Delaware corporation;
SONY BMG MUSIC ENTERTAINMENT,
a Delaware general partnership;
ARISTA RECORDS LLC,
a Delaware limited liability company;
INTERSCOPE RECORDS,
a California general partnership;
WARNER BROS. RECORDS INC.,
a Delaware corporation; and
UMG RECORDINGS, INC.,
a Delaware corporation;

Plaintiffs,

v.

ORDER
Civil File No. 06-1497 (MJD/RLE)

JAMMIE THOMAS-RASSET,

Defendant.

During the testimony of Plaintiffs' expert, Dr. Doug Jacobson, Jacobson opined that an external hard drive had been connected to Defendant Jammie Thomas-Rasset's computer. He testified that he formed that opinion based on a device or data log on Thomas-Rasset's computer that demonstrated a footprint

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from the external hard drive. Plaintiffs did not reveal the existence of the data log prior to Jacobson's trial testimony. During the First Trial in this matter, Jacobson testified that the basis for his testimony that another hard drive had been connected to Thomas-Rasset's computer was the rate at which the sound recording files were loaded onto her computer.

Jacobson further testified that he probably took screen shots of the data log. No such screen shot was produced to Defendant. Jacobson testified that he first viewed this device log and used that data to form his footprint theory the week before trial when he reinspected the forensic copy of Thomas-Rasset's computer. Jacobson also testified that he first mentioned the footprint theory to Plaintiffs' counsel a few days ago. Despite this entirely new basis for Jacobson's theory, a basis which Jacobson revealed to Plaintiffs' counsel, Defendant received absolutely no notice of the footprint theory.

As Plaintiffs' counsel admitted to the Court, Plaintiffs failed to supplement their expert disclosures, as required by Federal Rule of Civil Procedure 26, to reveal Jacobson's new footprint opinion and the device log basis for that new opinion.

Under Federal Rule of Civil Procedure 37(c), this Court has "wide discretion" to fashion a remedy when a party fails to provide information in compliance with Rule 26(a) or (e). Wegener v. Johnson, 527 F.3d 687, 692 (8th Cir. 2008) (citations omitted).

> The district court may exclude the information or testimony as a self-executing sanction unless the party's failure to comply is substantially justified or harmless. When fashioning a remedy, the district court should consider, *inter alia*, the reason for noncompliance, the surprise and prejudice to the opposing party, the extent to which allowing the information or testimony would disrupt the order and efficiency of the trial, and the importance of the information or testimony.

Id. (citations omitted).

In this case, as Plaintiffs' counsel admitted to the Court, the failure to supplement was not substantially justified. Jacobson revealed the footprint theory to Plaintiffs' counsel, and Plaintiffs' counsel failed to fulfill his duty to supplement under Rule 26. There is no explanation for this failure. This failure was not harmless. With no notice of the footprint theory, Defendant was unable to prepare for cross examination on that point or to obtain her own expert testimony to attempt to rebut that theory. The failure to supplement resulted in complete surprise to Defendant.

The Court cannot ameliorate the surprise and prejudice to Defendant without excluding this testimony. This case is being tried for the second time, after multiple delays. An additional delay would be inefficient, unjust, and a waste of the Court's and parties' resources. Finally, the Court holds that this information is important in that it goes to Defendant's computer proficiency, but the information is not essential to Plaintiffs' case.

In accordance with the Court's June 16, 2009, oral order and based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

> During trial, and at the end of the trial, the jury shall be instructed as follows: You heard testimony from Plaintiffs' expert, Dr. Jacobson, that there was evidence of an external hard drive connected to the computer that he examined. You are instructed that there is no basis for the testimony regarding the external hard drive and that you should disregard this testimony and all evidence referred to in connection with the testimony about the external hard drive.

Dated: June 16, 2009

s/ Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court